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Supreme Court, U.S.
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No. 97-346

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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November 17, 1997

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26 pp

QUESTIONS PRESENTED

1. Does a condition of probation providing that a probation officer can conduct searches with no individualized suspicion violate the Fourth Amendment's guarantee against unreasonable searches?

2. Does the expiration of a fraternal organization's term of probation render its appeal moot when the fraternity took all diligent steps to expedite its case through the judicial system, when it suffers collateral consequences as a result of the search condition and the underlying conviction, when the duration of probation was necessarily too short for it to be reviewed but the situation is likely to be repeated, when the conditions of probation chill its members' rights of association, when the theoretical underpinnings of mootness are unresolved, and when it is unfair for the State to violate individuals' and organizations' rights against warrantless searches yet stand behind a procedural doctrine preventing review.

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REPLY TO BRIEF IN OPPOSITION

Zeta Chi Fraternity respectfully replies to the State of New Hampshire's Brief in Opposition, which alleged that this case is moot, and prays that its petition for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case be granted.

REPORT OF OPINION BELOW

On May 22, 1997, the New Hampshire Supreme Court rendered an opinion in this case. *State of New Hampshire v. Zeta Chi Fraternity*, 142 N.H. 16, 696 A.2d 530 (1997).

STATEMENT OF FACTS CONCERNING MOOTNESS

In its Brief in Opposition, the State of New Hampshire requests that Zeta Chi Fraternity's Petition for Writ of Certiorari be denied on the grounds that the case is moot. Zeta Chi Fraternity has stated facts rebutting that allegation in affidavits which are reproduced in the appendix to this Reply Brief. The relevant facts concerning the mootness issue are set forth here.

Zeta Chi Fraternity was sentenced to a two-year term of probation which included a provision allowing the police and the probation department to conduct unannounced searches of the fraternity's premises. On at least two occasions, searches were conducted pursuant to the probation condition. Nelson Aff., *Appendix* at 1; Moore Aff., *Appendix* at 3. In one instance, a brother was too scared to return to his fraternity for two months. Nelson Aff., *Appendix* at 1.

As a result of the searches, prospective members were too wary of the fraternity to join. DiScipio Aff., *Appendix* at 6. Some prospective members, who had completed the application procedures and been accepted into the fraternity, declined membership. Moore Aff., *Appendix* at 3. Individuals who where not associated with the crime were subject to warrantless searches.

Moreover, the fraternity suffered a significant drop-off in the number of people interested in joining. Before the fraternity's sentence, it enjoyed between 11 and 19 new member pledges during the fall semester, and between 6 and 11 in the spring. In the fall of its conviction, however, the fraternity got just 8, and then only 4 in the spring. In 1995, the fraternity enjoyed just 9 pledges in the fall and none in the spring. Boulanger Aff., *Appendix* at 8.

Because of this decline, the fraternity suffered financially. It lost membership dues it would have otherwise collected, and can

expect perpetually diminished revenue from the reduced stream of alumni contributions.

Also, the fraternity lost its recognition as an official University of New Hampshire (UNH) organization, and cannot easily regain it. Such status confers the ability to use UNH's name, apply for funding and office space, be listed in UNH publications and get reduced-fee advertising in them, sponsor official programs, use various UNH advertising resources, participate in an annual activities fair, receive mail at the University, and other benefits. University of New Hampshire, STUDENT RIGHTS, RULES AND RESPONSIBILITIES 7-15 (1997) (*Student Code of Conduct*, describing sanctions for students and organizations convicted of crimes); *id.* at 54-56 (*Academic Policies* §18, describing policies under which organizations gain recognition by UNH and benefits thereof).

REASONS CASE IS NOT MOOT

The State of New Hampshire alleges in its Brief in Opposition that Zeta Chi Fraternity's Petition for Writ of Certiorari is moot. Although Zeta Chi's sentence has been served, and probation has lapsed, the case is not moot. *Sibron v. New York*, 392 U.S. 40, 51 (1968) ("mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court").

I. Zeta Chi was Diligent in Prosecuting its Appeal

Sibron v. New York created two exceptions to the mootness doctrine in criminal cases where the defendant's sentence has been served. Under the first exception, a case is not moot when, despite the defendant's diligent prosecution of the appeal, because of inherent delays in the justice system the case could not reach this Court before the expiration of the sentence. This mootness exception was reiterated in *Street v. New York*, 394

U.S. 576 (1969). In *St. Pierre v. United States*, 319 U.S. 41, 43 (1943), this Court stated that the case was moot, in part, because "[i]t does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence."

In the current case, Zeta Chi Fraternity was diligent in prosecuting its case. It appealed to the New Hampshire Supreme Court within 30 days of its sentencing, pursuant to New Hampshire court rules. N.H. Sup. Ct. R. 7. It filed its brief within the time ordered by the court, never asked for an extension of time, and appeared at oral argument at the time ordered by the court. Within 90 days of the New Hampshire Supreme Court's opinion, Zeta Chi filed its Petition for Writ of Certiorari with this Court. U.S. Sup. Ct. R. 13.

Thus, the fraternity diligently prosecuted its appeal, and created no delays. The process could not have been made quicker. The case did not reach this Court before the expiration of the fraternity's sentence because of the inherent delays built into the justice system, and not because of any fault by the petitioner. This case therefore comes under the *Sibron* exception, and the merits should be reached.

II. The Sentence has Collateral Consequences

Sibron's "second exception . . . permits adjudication of the merits of a criminal case where under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied." *Sibron v. New York*, 392 U.S. at 53-54 (quotations omitted). At one time, this Court required a showing of collateral consequences in all cases. *St. Pierre v. United States*, 319 U.S. at 42-43. This Court has since announced a presumption of collateral consequences when the defendant appeals a conviction. *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Fiswick v. United States*, 329 U.S. 211 (1946);

United States v. Morgan, 346 U.S. 502 (1954). But on appeal of the sentence only, and not the underlying conviction, the defendant must allege consequences. *Lane v. Williams*, 455 U.S. 624 (1982). The collateral effects alleged may be potential, remote, or speculative, *Ginsberg v. New York*, 390 U.S. 629, 633-34 n. 2, (1968), *reh'g denied*, 391 U.S. 971, and need not be confined to legal consequences. *Street v. New York*, 394 U.S. at 580 n.3; *Carafas*, 391 U.S. at 237.

For mootness purposes, an appeal of a sentence alone carries with it all the collateral consequences created by the underlying conviction. *Pollard v. United States*, 352 U.S. 354 (1957). In *Pollard*, the defendant appealed to this Court the legality of his sentence, but did not attack the underlying conviction. This Court found that because a sentence cannot exist without its underlying conviction, the collateral consequences resulting from the conviction defeat a mootness claim even when the sentence alone is being appealed. *Id.* 352 U.S. at 358.

> "In *Pollard v. United States*, the question was raised as to whether or not the case was moot because the petitioner had been released from prison after his petition for certiorari had been granted. The issue presented was not that of guilt, but instead one that related only to the propriety or legality of the sentence imposed. We said 'The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.' Though we divided on the merits, we were unanimous on that point."

Wetzel v. Ohio, 371 U.S. 62, 65 (1962) (citations omitted). *See North Carolina v. Rice*, 404 U.S. 244 (1971) (remanded for findings on mootness issue).

Zeta Chi Fraternity has suffered collateral consequences as a result of the probation search provision, which alone is being

appealed, and of the underlying conviction. Because of the search condition, the Fraternity lost members and failed to attract new ones. The Fraternity therefore lost revenue and lost the continuing stream of revenue from future alumni which it could have expected had the random search condition not been imposed.

Because of the convictions, the fraternity lost its status as an organization recognized by UNH, and cannot easily regain it in the future. Also, the conviction can be used against Zeta Chi Fraternity in the future in the same manner as a prior conviction can be used against any defendant for such purposes as elevating penalties or attacking credibility. *See, e.g., Fiswick v. United States*, 329 U.S. at 211; *United States v. Morgan*, 346 U.S. at 502; *Ginsberg v. New York*, 390 U.S. at 629. *See also*, U.S.S.G. §8C2.5(c) (elevation of sentence based on prior criminal history).

III. This Case is Capable of Repetition Yet Evading Review

This Court has allowed moot cases to be considered when they are capable of repetition yet evading review. This exception to the mootness doctrine applies when the action complained of is short in duration. *See, e.g., Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911) (short-term orders); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (5 years short enough duration). In the present case, the probation lasted just two years, a duration demonstrably short enough that it lapsed before the case reached this Court.

There must also be a reasonable expectation that the same party will suffer the same harm. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Honig v. Doe*, 484 U.S. 305, 319 (1988); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (party"faces some likelihood of becoming involved in same controversy in the future"); *Burlington N. R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (parties

"reasonably likely" to find themselves in future dispute). This Court has allowed the exception to apply even when it is speculative that the identical parties will be involved in the future dispute. *Meyer v. Grant*, 486 U.S. 414 (1988) (assuming same organization would attempt to place same question on ballot in subsequent election); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466 (1991) (assuming that same person would seek to be candidate for labor union post); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (assuming same women would have unwanted pregnancy and would seek abortion). This Court has been less generous with the exception when the party can avoid the injury by abiding the law. *Honig v. Doe*, 484 U.S. at 320 ("for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury") *citing Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Murphy v. Hunt*, 455 U.S. 478 (1982); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

However, given the prevalence of drinking on college campuses, and that the vast majority of UNH students are under New Hampshire's legal drinking age of 21,[1] it is likely that this fraternity, or some other, will be found guilty of underage drinking. Moreover, upon conviction, it is likely that probation with a unwarranted search condition will again be imposed. For organizations convicted of crimes, incarceration is of course not an option. To enforce a sentence, probation with a search condition is one of the few ways criminal courts can maintain

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[1]71% of UNH students are between 17 and 21 years old. Walter beGruyter, American Council on Education, AMERICAN UNIVERSITIES AND COLLEGES 1033 (14th ed. 1992).

supervision and control of what exists and occurs on an organization's premises. U.S.S.G. §8, introductory commentary ("probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented"); U.S.S.G. §8D (organizational probation); N.H. Rev. Stat. Ann. § 504-A:1 *et seq.*; N.H. Rev. Stat. Ann § 651:2, V.

IV. Mootness Standards are Relaxed When Constitutional Violations are Alleged

Mootness is closely related to standing. Mootness is "the doctrine of standing in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Geraghty*, 445 U.S. 388 at 397 (quotation omitted).

Standing generally requires that a party has sustained or is in immediate danger of sustaining a direct injury as a result of the action. However, standing is relaxed when constitutional issues are raised. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private litigant may raise equal protection claim of excluded juror). Standing requirements are particularly relaxed when first amendment issues are present. *See, e.g., Maryland v. Munson Co.*, 467 U.S. 947 (1984); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Zeta Chi Fraternity's rights to associate were chilled by the probation search condition. Several people understandably refused to join the fraternity, and some brothers considered leaving. One brother refused to return for two months.

Because of the constitutional rights to associate that this case touches, justiciability doctrines, including mootness, should be relaxed. Moreover, the government should not be permitted to violate citizens' rights, and then to stand behind the procedural device of mootness to avoid review of its actions.

V. This Case Presents a Unique Opportunity to Address Unresolved Issues of Mootness Law and of Organizational Sentencing

This Court has recognized that its Article III jurisprudence is "riddled with exceptions" motivated by "practicalities and prudential considerations." *Geraghty*, 445 U.S. at 406 n.11. This case presents this Court with an opportunity to revisit whether mootness is a constitutional issue, particularly in the criminal context.

In *Honig v. Doe*, 484 U.S. 305 (1988), this Court explored the several theoretical underpinnings of mootness, Corey C. Watson, *Mootness and the Constitution*, 86 NW. U. L. REV. 143 (1991), but left the matter unresolved. There is substantial precedential and historical authority to abandon article III's constitutional limitations on justiciability. *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring); Evan T'sen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 05 (1992).

Without a "case and controversy" limitation, this Court may easily accept this case to determine the merits raised in Zeta Chi Fraternity's Petition for Certiorari , which are also important and unresolved.

Moreover, as the State of New Hampshire points out "[t]he petitioner is a corporation and the issues surrounding the search of a corporate premises may differ from those involved in the search of an individual." *Brief in Opposition* at 8. In this case, people who were not members of the organization nor present at the time of the crime were subject to searches without cause. In addition, organizational crimes are not often litigated to finality, especially in light of the incentives built into the federal sentencing guidelines which encourage corporate defendants to escape liability by attributing responsibility to individuals. *See,*

e.g., U.S.S.G. §8C2.5(g) and §8C2.5(g) application note 12 (reduction of sentence for reporting culpable individuals). This case thus presents an opportunity to determine the conditions under which organizations are sentenced.

CONCLUSION

The law concerning whether a probation search must be justified by individualized suspicion is currently chaotic and should be resolved by this Court. Moreover, the State should not be allowed to violate individuals' and organizations' rights against warrantless searches, and then to claim that the matter is non-justiciable on the grounds of delays inherent in the justice system. For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX

Affidavit of Michael P. Nelson *A1*

Affidavit of Jeffrey T. Moore *A3*

Affidavit of Michael J. DiScipio *A6*

Affidavit of Todd A. Boulanger *A8*

University of New Hampshire, STUDENT RIGHTS, RULES AND RESPONSIBILITIES 7-15 (1997) .....
..... *Due to length, publication submitted separately*

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

AFFIDAVIT

I, the undersigned, after being duly sworn, depose and state as follows:

1. I have personal knowledge of all statements set forth herein and they are true to my best knowledge and belief;

2.

During the UNH Homecoming of 1996, Sgt. Kelly, of the Durham Police Department, proceeded to enter, without being invited by any member of the fraternity, the front entrance and kitchen area of the Zeta Chi Fraternity. Upon his entrance, he then proceeded to instruct everyone in the area to leave the house immediately. When he turned to me and asked me to leave, I informed him that I was a brother of Zeta Chi. I also informed him that I lived a great distance away and that I was staying at the house for the weekend. However, even after hearing my pleas, Sgt. Kelly forced me to leave the house and instructed me not to return unless I wanted to be arrested.

With no place to go, I headed to the nearest resident hall and snuck into the lounge. There I spent the night on the floor until an R.A. kicked me out. At this point, it was close to sunrise. I proceeded to retrieve my car from the Zeta Chi parking lot and headed directly home. I did not return to the Zeta Chi house for over two months due to my lingering fear that the above mentioned incident would be repeated.

Michael P. Nelson

Michael P. Nelson

October 29, 1997

PERSONALLY APPEARED the above named, Michael P. Nelson, and gave oath that the foregoing subscribed to by him is true to his best knowledge and belief, Before Me:

Notary Public / Justice of Peace
Commission Expires: 4/14/98

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

AFFIDAVIT

I, the undersigned Jeff Moore, of 328 F. Street NE, Washington DC, 20002, after being duly sworn, state as follows:

1) I was an active member of Zeta Chi fraternity from September of 1992 until May of 1996 when I graduated from the University of New Hampshire. I was Secretary of the fraternity from December of 1993 until December of 1994, and worked extensively with our attorney's during our trial. After my term as Secretary was over, I continued to assist the new officers with court proceedings and decision making. On Saturday, March 30, 1996, during the time of Zeta Chi's Probation, the Durham Police Department (DPD) arrived at the Zeta Chi Fraternity around 10:00 pm, without our probation officer. They had heard rumors that ZX was having a function that night and had hoped to come and break it up. These rumors proved to be false and there was nothing going on at the fraternity that warranted their attention. It is safe to say the Durham Police were quite irritated that there was no party of be dispersed. At this point in time, I was entertaining a few friends and prospective members in my private room that was located on the second floor of the fraternity. Once in the outer door of the building, they heard music and voices coming from my room in the fraternity house. The officers proceeded to knock on my door and demanded they be allowed in. My roommate at the time, Craig Simpson, stepped outside our apartment to speak with the officers. I was in my bedroom and some of my friends who were in the apartment informed me that he was talking to the police. Having been involved in the fraternities legal matters from the beginning and knowing the details of our probation, I thought it would be a good idea to see what the officers wanted.

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When I stepped outside, I was immediately confronted by the officers. One Junior Officer shouted immediately at me, "What the fuck do you want? This doesn't concern you.". I explained to him that Craig was my roommate and I wanted to make sure that there wasn't any problem. At this point the Captain of the Police Force, Captain McGann, told me he knew we had people in our room and our recent sentence allowed him to search my room. I was firm in stating to him that my room was not a common area, and that the court order did not allow him to search it. This statement only served to further infuriate the already aggressive officers and they continued their threats. I was told that if I didn't let them search my room, that I would be brought down to the station and that they would get Craig and myself "thrown out of school" I continued to stress to them that they were not allowed to search my room and that there was nothing legally they could do to me or my education for not allowing them into my private room. This argument ended with a few threats that they would be back and that they would get me for some other violation.

Having dealt with the Durham Police on several occasions during the previous two years, their threats and heavy-handed tactics were not new to me. However, my roommates, the prospective members and guests in my apartment were visibly shaken by this incident. My roommate, considered leaving the fraternity and moving into an apartment away from the fraternity. He did not want to deal with the constant harassment from the DPD and possibility of being search or even detained for no reason at all. After much lobbying, discussions with his family and on the strength of our friendship, I convinced him that he should stay and that the police could not do anything to violate his rights. Unfortunately, I did not have as much luck with the prospective members. Two young men, both named Chris (I will be happy to give their full names if requested) where actually invited to join the Zeta Chi Fraternity, accepted and then quit because of the harassment by the DPD. I tried to convince them that the DPD could not search private living areas and that people like myself knew the parameters

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AFFIDAVIT

of our sentence and would not allow our rights to be violated. However, this argument was not strong enough and these two men decided not to join the Zeta Chi.

2) I believe the story above give examples of brothers of ZX living in fear of the DPD and invasions of their privacy, not to mention the fear experienced by the guests of members living in the fraternity. I personally feared that I would actually be detained for not allowing them to search my room. On several occasions, myself, Dave Flanders and Justin Sprinzen, had confrontations with the DPD where we were threatened with arrest if we did not comply with their illegal wishes. Many times, I would have to argue and even defy my parents wishes to continue to live at ZX. Only my love of fraternity, and understanding of my personal rights, allowed me not only to live in such a hostile and unstable environment, but to excel in my schoolwork and professional pursuits.

Dated: October 30, 1997

Jeffrey T. Moore

State of: New Hampshire
County of: Strafford

PERSONALLY APPEARED the above named Jeffrey T. Moore and made oath that the foregoing subscribe to by his is true to his best knowledge and belief, before me:

Notary Public/Justice of Peace
Commission Expires: October 18, 2000

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

AFFIDAVIT

I, the undersigned, after being duly sworn, depose and state as follows:

1. I have personal knowledge of all statements set forth herein and they are true to my best knowledge and belief;

2. In September of 1997, a promising young man came to our fraternity house. Ted Neumann hung out with us every day and night. He earned a bid, began pledging, and was my fraternal little brother. About two weeks into pledging Ted got a minor violation and was forced to meet with the notorious Captain McGann of the Durham police department.

He returned to the fraternity house, and was noticeably upset. He told me that Captain McGann had forbidden him to continue pledging. He then said that Zeta Chi brothers were "social bandits" and do not belong in school. He continued to threaten Ted, McGann told him that he would hold random searches of the fraternity, and if Ted was here he would be kicked out of school. Not only were we off probation at this point, but the New Hampshire Supreme Court had already ruled against such searches.

I explained to Ted that these searches could not happen, and that even if they could McGann had no business telling Ted what off campus locations he could hang out in. Two days later, Ted Neumann terminated his pledge status in Zeta Chi Fraternity. His reason was "I can't deal with this right now, and if I get kicked out of school my parents will kill me".

Since that day Ted has not come back to the house. We lost a good friend, a potential brother, and Captain McGann cost a student at The University Of New Hampshire a wonderful opportunity.

Michael James DiScipio

Michael James DiScipio
President Zeta Chi Fraternity

October 29, 1997

PERSONALLY APPEARED the above named, Michael James DiScipio, and gave oath that the foregoing subscribed to by him is true to his best knowledge and belief, Before Me:

Notary Public / Justice of Peace
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November 12, 1997

AFFIDAVIT

1.) I, Todd Boulanger of Washington, D.C. was an active Zeta Chi Fraternity brother from 1993-1995. During that time period I presided as vice-president of the organization from the spring of 1993, to the fall of 1994. Since the spring of 1996, I have acted as the organization's alumni advisor.

2.) On average, a fall semester would yield anywhere from 11-19 pledges. Immediately following the sentence, we received eight. The spring semester typically yields between 6-11. Following the sentence, we received four. In 1995, I believe we received nine pledges in the fall and had no pledges in the spring. In 1995, we had 54 active members--meaning that they were members participating financially in the organization. Today, excluding current pledges, there are 24 active members of the Fraternity. Unfortunately, Zeta Chi has suffered and continues to suffer financial loss and hardship due to the specifics of our probation.

State of New Hampshire
County of Strafford

Todd A. Boulanger

PERSONALLY APPEARED the above named Todd A. Boulanger and made oath that the foregoing subscribe to be his is true to his best knowledge and belief, before me.

Notary Public
Justice of Peace
Expires October 18, 2000